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No. 82-263

In the Supreme Court of the United States

OCTOBER TERM, 1982

NICK BOULAHANIS AND DONALD SCALISE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the admission of the grand jury testimony of a government witness who refused because of fear for his safety to testify at petitioners' trial violated either the Confrontation Clause of the Sixth Amendment or Fed. R. Evid. 804(b)(5).

2. Whether the evidence was sufficient to prove that petitioners' extortion affected interstate commerce within the meaning of the Hobbs Act, 18 U.S.C. 1951.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 677 F. 2d 586.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1982. A timely petition for rehearing was denied (Pet. App. 10a) on June 15, 1982. The petition for a writ of certiorari was filed on August 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of affecting interstate commerce by extortion, in violation of the Hobbs Act, 18 U.S.C. 1951, and of using extortionate means to attempt to collect an extension of credit, in violation of 18 U.S.C. 894. Petitioner Boulahanis was sentenced

to concurrent terms of five years' imprisonment, and petitioner Scalise to concurrent terms of seven years' imprisonment. The court of appeals affirmed the Hobbs Act convictions, reversed the convictions under 18 U.S.C. 894, and remanded for resentencing (Pet. App. 1a-9a).

1. The evidence, as reflected in the opinion of the court of appeals, showed that Nick Velentzas owned a Greek coffee house called the Hellenic Social Club in Chicago, Illinois, where men gathered to socialize, drink coffee, and gamble (Pet. App. 1a). On June 12, 1979, petitioners and a co-defendant, Frank Renella,[1] appeared at the club, beat Velentzas with their fists, and destroyed several pieces of furniture in the club (*id.* at 1a-2a).

The next day, Velentzas contacted the FBI and was provided with a recording device that he wore strapped to his ankle (Pet. App. 2a). Petitioners returned to the coffee shop that evening. They demanded that Velentzas pay protection money in order to continue gambling in the club—$300 for the previous month and $500 per month thereafter. In return, they promised that no one else would harm Velentzas and that they would "terrorize nobody more in here" (*id.* at 2a).

Velentzas was unavailable to testify at trial, because he had been murdered by persons unknown (Pet. App. 3a). The government introduced the recording of the June 13 conversation with petitioners. In addition, the government subpoenaed James Chiampas, who was present at the coffee house when Velentzas was beaten. Chiampas appeared at trial but refused to say anything about the case because, as he explained to the court, he feared for his life. He continued to refuse to testify even though the district court

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[1]Renella became a fugitive on the eve of trial. He was apprehended in October 1981, and subsequently pleaded guilty to both counts of the instant indictment.

twice ordered him to do so (*ibid.*). The court then released Chiampas and admitted into evidence the transcript of Chiampas' grand jury testimony, in which he described the assault on Velentzas, identified petitioners and Renella from photographs as the assailants, and stated that he saw petitioners return the next night and walk outside the club with Velentzas (Pet. App. 3a, 18a-27a). Subsequently, petitioner Scalise, testifying in his own defense, admitted participating in the assault (Pet. App. 5a).

The government also proved that Velentzas' Hellenic Social Club purchased the coffee it provided to its customers from outside the State of Illinois. The total amount purchased was approximately $68 per month (Pet. App. 6a).

2. The court of appeals affirmed the convictions on the Hobbs Act count (Pet. App. 1a-9a). The court held that the admission of Chiampas' grand jury testimony was not error. It found that Chiampas was "unavailable" within the meaning of Fed. R. Evid. 804[2] and that his grand jury testimony, which had been voluntarily given under oath and was fully consistent with all other evidence, was reliable hearsay on an important part of the government's case-in-chief (Pet. App. 4a-5a). The court held that these findings satisfied the requirements of both Rule 804 and the Sixth Amendment's Confrontation Clause (Pet. App. 5a-6a).

The court of appeals also held that the evidence was sufficient to prove that petitioners' extortion had an effect on interstate commerce. The court held that any effect is sufficient and that the depletion of the club's assets, which

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[2]As the court of appeals pointed out: "[I]t would have been needless cruelty for the court to have put Chiampas to a choice between going to jail and running the risk of meeting Velentzas' fate" (Pet. App. 4a).

diminished its potential for purchasing goods in interstate commerce, satisfied the jurisdictional requirement in the Hobbs Act (Pet. App. 6a-7a).

ARGUMENT

1. Petitioners argue (Pet. 6-13) that the court of appeals erred in upholding, under the Confrontation Clause and Rule 804(b)(5), the district court's decision to admit Chiampas' grand jury testimony after he refused to testify at trial. The decision of the court of appeals, which is limited to a fact-specific evaluation of the reliability of this particular testimony, is correct and does not warrant review by this Court.

This Court has recognized previously that the hearsay rule and the Confrontation Clause have similar roots and protect essentially the same values. *Dutton* v. *Evans*, 400 U.S. 74, 86 (1970). Thus, the admissibility of prior statements of "unavailable" witnesses under both the Constitution and the Federal Rules of Evidence requires that the out-of-court statements, in light of the circumstances in which they were made, bear certain " 'indicia of reliability' " (*Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980), quoting *Mancusi* v. *Stubbs*, 408 U.S. 204, 213 (1972)) or, stated differently, contain "circumstantial guarantees of trustworthiness" (Fed. R. Evid. 804(b)(5)).

Although not all grand jury testimony satisfies the rigorous standards, see *United States* v. *Fiore*, 443 F. 2d 112, 115 (2d Cir. 1971), the issue must necessarily be disposed of on a case-by-case basis; no court of appeals has rejected all grand jury testimony as unreliable. Compare *United States* v. *Medico*, 557 F. 2d 309, 315-316 (2d Cir.), cert. denied, 434 U.S. 986 (1977); *United States* v. *Ward*, 552 F. 2d 1080, 1083 (5th Cir.), cert. denied, 434 U.S. 850 (1977), with *United States* v. *Fiore*, *supra*; *United States* v. *Gonzalez*, 559 F. 2d 1271, 1273-1274 (5th Cir. 1977). See also *United*

States v. *West*, 574 F. 2d 1131, 1134-1138 (4th Cir. 1978); *United States* v. *Garner*, 574 F. 2d 1141, 1143-1146 (4th Cir.), cert. denied, 439 U.S. 936 (1978); *United States* v. *Carlson*, 547 F. 2d 1346, 1354-1357 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977); *United States* v. *Thevis*, 665 F. 2d 616, 629-633 (5th Cir.), cert. denied, No. 81-2025 (June 1, 1982). The court of appeals' decision that the Chiampas' grand jury testimony was sufficiently reliable to warrant its admission is fully consistent with all of the cited cases.

Chiampas was a disinterested witness who had no motive to curry favor with the government by testifying before the grand jury. Moreover, his testimony was corroborated by several other sources at trial, including other witnesses, and by petitioners themselves. For example, in the tape recorded conversation of June 13, petitioner Boulahanis made reference to beating up Velentzas the previous night. In addition, petitioner Scalise testified at trial and admitted that he was present at the club on both nights, that Boulahanis and Renella struck Velentzas on the first night, and that the taped conversation was accurate (Pet. App. 5a).[3] Under these circumstances, Chiampas' grand jury testimony was in no sense "crucial" or "devastating" (*Dutton* v. *Evans*, *supra*, 400 U.S. at 87), and, indeed, as the court of appeals implied (Pet. App. 5a), the testimony became superfluous after petitioner Scalise testified. Accordingly, the use of the hearsay grand jury evidence in this case did not violate petitioners' confrontation rights as embodied in either the Constitution or Rule 804(b)(5). See *Ohio* v. *Roberts*, *supra*, 448 U.S. at 65-66; *Dutton* v. *Evans*, *supra*, 400 U.S. at 87-89.

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[3]Petitioners availed themselves of their opportunity to cross-examine the other witnesses. Petitioner Boulahanis declined, however, to cross-examine petitioner Scalise.

2. Petitioners contend (Pet. 14-16) that because Velentzas' club's purchases of coffee in interstate commerce amounted to only $68.00 a month, there was an insufficient effect on commerce to sustain their convictions under the Hobbs Act. As the court of appeals correctly pointed out (Pet. App. 6a), however, the Act punishes anyone who " 'in any way or degree * * * affects * * * commerce' " by extortion. This language demonstrates a clear intent "to use all the constitutional power Congress has to punish interference with interstate commerce by extortion * * *." *Stirone* v. *United States*, 361 U.S. 212, 215 (1960).

Accordingly, the lower courts have uniformly held that the magnitude of the effect on commerce is immaterial. See, *e.g.*, *United States* v. *Zemek*, 634 F. 2d 1159, 1173 n.20 (9th Cir. 1980), cert. denied, 450 U.S. 985 (1981); *United States* v. *Rabbitt*, 583 F. 2d 1014, 1023 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979); *United States* v. *Elders*, 569 F. 2d 1020, 1025 (7th Cir. 1978); *United States* v. *Daley*, 564 F. 2d 645, 649 (2d Cir. 1977), cert. denied, 435 U.S. 933 (1978); *United States* v. *Harding*, 563 F. 2d 299, 302 (6th Cir. 1977), cert. denied, 434 U.S. 1062 (1978); *United States* v. *Starks*, 515 F. 2d 112, 124 (3d Cir. 1975); *United States* v. *Nadaline*, 471 F. 2d 340, 343 (5th Cir.), cert. denied, 411 U.S. 951 (1973); see also *United States* v. *Santoni*, 585 F. 2d 667, 671 (4th Cir. 1978), cert. denied, 440 U.S. 910 (1979). Petitioners admit that their extortion had some effect on interstate commerce, and that is all that is required.[4] Since the court of appeals' interpretation of the

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[4]Petitioners incorrectly rely (Pet. 14) upon an earlier Seventh Circuit decision as being in conflict with the court's decision in this case. See *United States* v. *Mattson*, 671 F. 2d 1020 (1982). That case involved the extortion of money from an individual who had no direct relationship to interstate commerce. Thus, as the court below observed (Pet. App. 7a), *Mattson* did not question the principle that a *de minimis* effect on interstate commerce is sufficient to sustain a Hobbs Act conviction. There is accordingly no conflict between the two decisions.

Hobbs Act is correct and conflicts with no decision of this Court or any court of appeals, it does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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